

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of Application of)	
)	
FRESNO MMDS ASSOCIATES)	File No. 60636-CM-P-91
)	
To Construct a New Multipoint Distribution)	
Service Station on Channels E1 through E4 in)	
Merced, California)	

MEMORANDUM OPINION AND ORDER

Adopted: June 24, 2003

Released: July 14, 2003

By the Commission:

I. INTRODUCTION

1. In this *Memorandum Opinion and Order*, we address Fresno MMDS Associates' (FMA) objection to the dismissal of its application to operate a Multichannel Multipoint Distribution Service (MMDS) station on Channels E1-E4 in Merced, California. Specifically, FMA filed an application for review¹ of the denial² of FMA's petition for reconsideration of the dismissal of the above-captioned application for the E Group channels. For the reasons discussed below, we deny FMA's application for review.

II. BACKGROUND

2. In 1983, the Commission reallocated the eight E and F Group channels from the Instructional Television Fixed Service to the Multipoint Distribution Service.³ The Commission opened a filing window for MMDS applications between September 2 and September 9, 1983.⁴ Former Section

¹ Application for Review (filed June 23, 2000) (AFR).

² Letter of Charles E. Dziedzic, Assistant Chief, Video Services Division, Mass Media Bureau to Robert D. Hostetler (May 24, 2000) (*Division Letter*).

³ Amendment of Parts 2, 21, 74 and 94 of the Commission's Rules and Regulations in regard to frequency allocation to the Instructional Television Fixed Service, the Multipoint Distribution Service, and the Private Operational Fixed Microwave Service, *Report and Order*, 94 FCC2d 1203 ¶ 85 (1983) (*MMDS Allocation R&O*).

⁴ Although the Commission permitted MMDS applicants to file applications beginning forty-five days after publication of the *MMDS Allocation R&O* in the Federal Register, the incorrect filing date was placed in the Federal (continued....)

21.901(d)(4) permitted the filing of MMDS applications only on dates specified by the Commission.⁵ Thus, following this initial application filing window, the Commission did not accept MMDS applications again until 1988.

3. On April 20, 1988, the former Common Carrier Bureau (Bureau) opened a filing window for MMDS applications for E and F Group channels.⁶ The Bureau began accepting these applications for any locations which were more than fifty miles from any proposed location of MMDS applications that were pending on April 19, 1988 or from any locations of licensed MMDS facilities.⁷ Additionally, applicants had to propose locations that were more than fifteen miles from the boundary of a statistical area for which there were MMDS applications pending on April 19, 1988.⁸ The *MMDS PN* stated that applications that failed to comply with the location requirements would be dismissed as unacceptable for filing.⁹ Consequently, the Bureau did not anticipate granting any waivers of the location requirements.¹⁰

4. MMDS applicants are expected to avoid harmful interference to other users and to avoid blocking potential adjacent channel use in the same city and co-channel use in nearby cities.¹¹ Consequently, the Commission's Part 21 Rules required MMDS applicants to prepare certain harmful interference studies.¹² The MMDS applicant then must serve these harmful interference studies upon all licensees, conditional licensees, and applicants of the stations for which it was required to perform the harmful interference studies.¹³

5. On November 1, 1990, Stella A. Pappas automatically forfeited her conditional license for Station WLW943 for the E Group channels in Merced, California.¹⁴ On July 15, 1991, FMA applied for

(Continued from previous page)

Register. See 48 Fed. Reg. 34,746 (1983); *MMDS Allocation R&O*, 94 FCC 2d 1203, 1265 ¶ 153 (1983). However, to prevent any potential prejudice, the Commission extended the filing period. Amendment of Parts 2, 21, 74 and 94 of the Commission's Rules and Regulations in regard to frequency allocation to the Instructional Television Fixed Service, the Multipoint Distribution Service, and the Private Operational Fixed Microwave Service, *Report and Order*, 98 FCC2d 129 n.1 (1984) (*MMDS Allocation MO&O and Order on Reconsideration*).

⁵ 47 C.F.R. 21.901(d)(4) (1983); see also *MMDS Allocation R&O*, 94 FCC2d at 1279 Appendix B.

⁶ Common Carrier Bureau Opens Filing Period for Multichannel Multipoint Distribution Service Applications, *Public Notice*, 3 FCC Rcd 2661 (1988) (*MMDS PN*). This filing window remained open until November 1, 1990, following which the Commission changed to a filing system under which applications had to be filed on the same day to be considered mutually exclusive. See Amendment of Parts 21, 43, 74, 78, and 94 of the Commission's Rules Governing Use of the Frequencies in the 2.1 and 2.5 GHz Bands Affecting: Private Operational-Fixed Microwave Service, Multipoint Distribution Service, Multichannel Multipoint Distribution Service, Instructional Television Fixed Service, and Cable Television Relay Service, Gen. Docket Nos. 90-54 and 80-113, *Report and Order*, 5 FCC Rcd 6410, 6424 ¶ 90 (1990).

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ 47 C.F.R. § 21.902(a) (1988).

¹² See e.g. 47 C.F.R. § 21.902(c) (1988).

¹³ See e.g. 47 C.F.R. § 21.902(g) (1988).

¹⁴ Stella A. Pappas, *Order on Reconsideration*, 8 FCC Rcd 4729 (CCB DFD 1993).

a license for the E Group channels in Merced, California and requested a waiver of the Commission's Rules.¹⁵ FMA is a partnership whose majority ownership resides in Fresno Wireless Cable Television, Inc., a wholly owned subsidiary of Sprint Corporation.¹⁶ FMA requested a waiver of all applicable FCC policies, rules and regulations to the extent necessary to allow the acceptance of its application because FMA's proposed transmitter site was within fifty miles of stations located in Fresno and Modesto, California.¹⁷ FMA asserted that unless it received a waiver, the introduction of MMDS services would be delayed.¹⁸ Additionally, FMA objected to protecting the service areas of applications that lost in the lottery, although it was willing to protect the service area of any conditional licensee.¹⁹ Finally, FMA asserted that the Commission had expressed a willingness to accept waivers for applications submitted in response to automatic forfeitures. Thus, FMA believed that grant of a waiver was appropriate under the circumstances presented.

6. On January 23, 1992, the Bureau's Domestic Facilities Division returned FMA's application as unacceptable for filing because FMA had failed to serve all affected parties with an interference analysis.²⁰ On February 6, 1992, FMA filed a petition for reconsideration of the *Application Return Letter*.²¹ FMA alleges that it simultaneously resubmitted its application.²² Subsequently, on April 3, 1995, FMA amended its application to effectuate a three-market settlement agreement involving Merced, Modesto, and Stockton, California. FMA supplemented this amendment on May 30, 1995.

7. On May 24, 2000, the former Mass Media Bureau's Video Services Division (Division) denied FMA's petition for reconsideration.²³ The Division noted that FMA had failed to file the requisite interference studies and failed to provide service of said studies upon interested parties.²⁴ In addition, the Division determined that FMA did not justify with the requisite statement of reasons FMA's request to waive all rules necessary for acceptance of its application.

8. On June 23, 2000, FMA filed the subject application for review.²⁵ FMA presents five reasons we should reverse the staff's decision. First, FMA contends that the Bureau failed to provide a reasoned

¹⁵ FCC File No. 60636-CM-P-91 (filed July 15, 1991) (FMA Application).

¹⁶ AFR at 2. The Merced, California Basic Trading Area (BTA) authorization is owned by FMA License Subsidiary, Inc., also a wholly-owned subsidiary of Sprint Corporation. *Id.*

¹⁷ FMA Application, Exhibit I.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ Application Return Notification from Consuela Kearney, Applications Examiner, Domestic Radio Branch, Domestic Facilities Division, Common Carrier Bureau to Fresno MMDS Associates (dated Jan. 23, 1992) (*Application Return Letter*).

²¹ Petition for Reconsideration (filed Feb. 6, 1992).

²² *Id.*

²³ *Division Letter, supra.*

²⁴ *Id.*

²⁵ FMA attached two consent letters from CS Wireless Systems, Inc. (CS Wireless), the licensee of the adjoining Modesto, CA BTA, as exhibits to the application for review. AFR, Exhibit 3. These letters stated that CS Wireless did not object to FMA's proposed operations. *Id.*

basis for denying FMA's waiver request.²⁶ Second, although the Bureau asserted that FMA failed to provide the required interference studies to the pertinent stations, FMA argues that the assertion lacked specificity concerning which stations it did not serve with the documentation.²⁷ Third, FMA asserts that the Bureau ignored Commission policies supporting market settlements.²⁸ Fourth, FMA asserts that overriding public interest concerns require reversal of the staff decision.²⁹ Finally, FMA alleges that the Bureau did not treat it the same as similarly situated applicants.³⁰

III. DISCUSSION

A. Waiver Analysis

9. FMA requested a waiver of all applicable Commission policies, rules, and regulations to the extent necessary to allow the acceptance of its application.³¹ The subheading of Exhibit I to its application states "Waiver of 50 Mile Spacing Policies."³² FMA noted that its proposed station was not consistent with the *MMDS PN*³³ because its proposed station was within fifty miles of two MMDS applications for the Modesto, California area, which were filed before April 20, 1988.³⁴ Additionally, its proposed transmitter site was within fifty miles of stations located in Modesto and Fresno, California.³⁵ Finally, FMA indicated that it was impractical to design its system to protect the service area of all the applications in the Modesto market due to the different transmit locations and configurations.³⁶ FMA expressed its intent to protect the service area of any conditional licensee.³⁷ For the above reasons, FMA believed the transmitter location requirements would unnecessarily delay introduction of MMDS service to the Merced area.³⁸

10. As noted previously, the Division determined that FMA's submission was insufficient to warrant a waiver. In order to receive a waiver of the Commission's Rules, FMA was required to make an affirmative showing that:

²⁶ AFR at 5 – 6.

²⁷ *Id.* at 5.

²⁸ *Id.* at 3 – 5.

²⁹ *Id.* at 7 – 8.

³⁰ *Id.* at 6 – 7.

³¹ FMA Application, Exhibit I.

³² *Id.*

³³ *MMDS PN*, 3 FCC Rcd at 2661.

³⁴ FMA Application, Exhibit I.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

(a) The underlying purpose of the rule will not be served, or would be frustrated, by its application in the particular case, and that grant of the waiver is otherwise in the public interest; or

(b) The unique facts and circumstances of a particular case render application of the rule inequitable, unduly burdensome or otherwise contrary to the public interest. Applicants must also show the lack of a reasonable alternative.³⁹

We believe that the Division correctly concluded that FMA failed to make the required showing. Applicants for waiver face a high hurdle and must plead the facts and circumstances which warrant a waiver.⁴⁰ Furthermore, an applicant for a waiver must articulate a specific basis, and adduce concrete support, preferably documentary.⁴¹ As the Division noted, “FMA simply asserted . . . that application of the FCC’s rules and policies in the present situation ‘would unnecessarily delay the introduction of MMDS service to the Merced area.’”⁴² Though FMA claimed that it would have been impractical to design its system to conform to the rules, FMA provided no specific explanation of why it was impracticable. Consequently, we agree that FMA failed to plead the facts and circumstances which would warrant grant of a waiver.

B. Service of Interference Studies

11. We note that while many of FMA’s arguments relate to its original request for waiver of the limitation on the locations of transmitter sites for MMDS stations,⁴³ the Bureau returned FMA’s application because FMA failed to serve all affected parties with copies of its application and interference analysis, as required by Section 21.902(g) of our Rules.⁴⁴ FMA’s statement that it has satisfied Section 21.902 does not reflect the state of events as of July 15, 1991, the day on which FMA filed its application. FMA’s resubmission of its application after the Bureau returned it to FMA does not change the defective nature of its application when FMA filed it on July 15, 1991. FMA did not serve any of the stations in its exhibit and cannot now claim that it has entered into agreements with the affected entities and has satisfied the requirements of Section 21.902. As the Commission has stated before, “[w]e cannot allow a party to ‘sit back and hope that a decision will be in its favor and, when it isn’t, to parry with an offer of more evidence. No judging process in any branch of government could operate efficiently or accurately if such a procedure were allowed.’”⁴⁵ The Commission makes provision for actual notice and an opportunity to be heard by parties in interest by requiring that MDS station applicants serve a copy of the

³⁹ 47 C.F.R. § 21.19 (1988).

⁴⁰ *WAIT Radio v. FCC*, 413 F.2d 1153, 1157 (D.C. Cir. 1969) (*WAIT Radio*) aff’d, 459 F.2d 1203 (1972) cert. denied, 409 U.S. 1027 (1972) citing *Rio Grande Family Radio Fellowship, Inc. v. FCC*, 406 F.2d 664 (D.C. Cir. 1968); *Birach Broadcasting Corporation, Memorandum Opinion and Order*, 2003 WL 202677 (2003).

⁴¹ *WAIT Radio v. FCC*, 413 F.2d at 1157 n.9; *Family Stations, Inc. v. Directv, Inc, Memorandum Opinion and Order*, 2002 WL 31841569 ¶ 7 (2002).

⁴² *Division Letter, supra*.

⁴³ 47 C.F.R. § 21.902(c).

⁴⁴ *See Application Return Letter, supra*. While the application was returned, the return was equivalent to the dismissal of the applications because Fresno did not have an opportunity to resubmit the applications.

⁴⁵ *See Canyon Area Residents, Memorandum Opinion and Order*, 14 FCC Rcd 8153, 8154 ¶ 7 (1999) quoting *Colorado Radio Corp. v. FCC*, 118 F.2d 24, 26 (D.C. Cir. 1941).

required interference analysis for their station on microwave station licensees that might be affected by operation of the MDS station.⁴⁶ FMA admits that it failed to serve the licensees for Stations WHT785, Stockton/Ripon, California, and WHG342, Mt. Bullion, California with a copy of FMA's application and interference analysis.⁴⁷ Due to FMA's lack of service, the orderly process contemplated by the Commission in this context was negated.⁴⁸

12. Additionally, FMA claims that the Bureau did not specify which stations FMA did not serve. We note that Exhibit E of FMA's application provides the call signs of stations that it identified as within fifty miles of its proposed transmitter site. FMA acknowledges that it did not serve any of the stations listed in its exhibit. Thus, we find FMA's claim that the Bureau's failure to specify the stations that FMA needed to serve as a basis for reversing the staff's decision is disingenuous, particularly given that FMA needed only to read Exhibit E of its application to glean such information.

C. Market Settlements

13. We also reject FMA's argument that the staff should have considered the settlement agreement that FMA filed three years after its application was returned. As FMA acknowledges, the settlement agreement violates the prohibition on substantial changes of ownership to pending MDS applications.⁴⁹ FMA argues that a waiver of this prohibition is warranted because of the amount of time the parties devoted to negotiating the agreement and because interference "is virtually inevitable without cooperation."⁵⁰ FMA appears to have ignored or overlooked that Section 21.29(f) of our Rules provides that even in the context of settlement agreements, the Commission will not allow an amendment that seeks more than a *pro forma* transfer of control of an MDS application.⁵¹ The purpose of this prohibition is to "supplement the ban on the formation of settlement agreements by prohibiting common settlement transactions that include options to buy" and to "eliminate the administrative burden and processing delays associated with amendments and modifications seeking changes in the ownership of pending MDS applications and MDS conditional licenses."⁵² FMA has not attempted to show how acceptance of the agreement here would be consistent with the underlying purposes of the rule, particularly given that the subject application had already been dismissed.

D. Public Interest Concerns

14. We decline to accept FMA's request that the Commission overturn the return of its application "in light of overriding public interest concerns."⁵³ In this regard, FMA argues that failure to

⁴⁶ See *Hinton Telephone Company, et al., Memorandum Opinion and Order on Reconsideration*, 10 FCC Rcd 11625, 11634-35 (1995), quoting *Edna Cornaggia, Memorandum Opinion and Order*, 8 FCC Rcd 5442, 5444 (CCB DFD 1993).

⁴⁷ AFR at 5.

⁴⁸ See *Hinton Telephone Company, et al., supra*.

⁴⁹ AFR at 4; See also 47 C.F.R. § 21.23(a)(3).

⁵⁰ AFR at 4.

⁵¹ 47 C.F.R. § 21.29(f).

⁵² Amendment of Parts 1, 2 and 21 of the Commission's Rules Governing Use of the Frequencies in the 2.1 and 2.5 GHz Bands, *Report and Order*, 8 FCC Rcd 1444, 1447 ¶ 14 (1993).

⁵³ AFR at 7-8.

reinstate FMA's application "will have a severely deleterious effect on the continued development of a competitively-viable MDS system in Merced."⁵⁴ That vague and unsupported statement falls far short of the justification needed to waive the clear deficiencies in FMA's application. As noted previously, an applicant for a waiver must articulate a specific basis, and adduce concrete support, preferably documentary to warrant a grant of a waiver.⁵⁵

E. Consent and Similarly Situated Applicants

15. Finally, we note that FMA has submitted two consent letters in its application for review.⁵⁶ We decline to consider these consent letters for two reasons. Applicants must submit those documents needed to make an application acceptable for filing (such as consent letters) with the original application.⁵⁷ These letters were submitted almost nine years after the initial submission of the application. Second, FMA's submission violates Section 1.115(c) of our Rules, which states, "No application for review will be granted if it relies on questions of fact or law upon which the designated authority has been afforded no opportunity to pass."⁵⁸ As FMA submitted these consent letters with its application for review, FMA did not provide the Bureau and/or Division with an opportunity to consider these letters. Accordingly, we decline to consider these letters at this time.

16. FMA also argues that other applications have been accepted under circumstances identical to FMA's circumstances.⁵⁹ The only action FMA cites to support its argument is the reinstatement of an application filed by Wireless Cable of Florida, Inc. (WCF) for a new MDS station at Sarasota, Florida.⁶⁰ After FMA filed its AFR, however, the Division reversed the reinstatement and dismissed WCF's application.⁶¹ Accordingly, we reject FMA's argument because the only action it cites to support its claim of inconsistent treatment was later reversed.

IV. CONCLUSION

17. The return of FMA's application was fully consistent with our Rules. FMA has also failed to show that it warrants a waiver of our Rules relating to this application. Accordingly, we will deny its application for review.

⁵⁴ *Id.* at 8.

⁵⁵ *See* para. 10.

⁵⁶ AFR, Exhibit 3-5.

⁵⁷ *See, e.g.,* Guadalupe Valley Electric Cooperative, *Order on Reconsideration*, 11 FCC Rcd 7434, 7444 (MMB VSD 1996); In the Matter of 4,330 Applications for Authority to Construct and Operate Multipoint Distribution Service Stations at 62 Transmitter Sites, *Memorandum Opinion and Order on Reconsideration*, 10 FCC Rcd 1335, 1343 n.13, 1470 ¶ 218 (1994).

⁵⁸ 47 C.F.R. § 1.115(c); *See Also*, Oklahoma Western Telephone Company, *Memorandum Opinion and Order*, 18 FCC Rcd 7565 (2003); Richard Duncan D/B/A Anderson Communications, *Memorandum Opinion and Order and Order on Remand*, 18 FCC Rcd 4189 (2003).

⁵⁹ AFR at 6-7.

⁶⁰ *Id.* at 6 n.10.

⁶¹ *See* Letter from Charles E. Dziedzic, Assistant Chief, Video Services Division, Mass Media Bureau to Paradise Cable, Inc., *et al.* (dated Aug. 22, 2001), *petition for recon. pending*.

V. V. ORDERING CLAUSE

18. Accordingly IT IS ORDERED that pursuant to Sections 4(i) and 5(c) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 155(c), and Section 1.115 of the Commission's Rules, 47 C.F.R. § 1.115, the Application for Review filed by Fresno MMDS Associates on June 23, 2000 IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary